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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. EDILBERTO RODRIGUEZ MARTIN, Defendant and Appellant.	E036898 (Super.Ct.No. SWF005607) OPINION

APPEAL from the Superior Court of Riverside County. Rodney L. Walker, Judge. Affirmed.

Ballecer & Segal, Natalee Segal; and Christopher C. Hite for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Pamela A. Ratner Sobeck, Supervising Deputy Attorney General, and David Delgado-Rucci, Deputy Attorney General, for Plaintiff and Respondent.

A jury found Edilberto Rodriguez Martin, defendant and appellant (hereafter defendant), guilty as charged of assault on Adrian E. with a firearm in violation of Penal Code section 245, subdivision (a)(2) (count 1); assault on Jonathan P.[1] with a firearm in violation of Penal Code section 245, subdivision (a)(2) (count 2); and maliciously discharging a firearm at an occupied motor vehicle in violation of Penal Code section 246 (count 3).[2] The jury also returned true findings on the special allegation in connection with counts 1 and 2 that defendant personally used a firearm in the commission of those crimes within the meaning of sections 12022.5, subdivision (a)(1) and 1192.7, subdivision (c)(8). Based on the jury's guilty verdicts and true findings, the trial court sentenced defendant to serve a total of nine years four months in state prison.[3]

Defendant raises various claims of error in this appeal, directed at challenging both the jury's guilty verdicts and the trial court's sentence. We conclude defendant's claims are meritless, and therefore will affirm the judgment.

FACTS

The pertinent facts are not in dispute. On September 26, 2003, about 1:45 p.m. Adrian E. was driving with his friend Jonathan P. entering the southbound lanes of

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[1] Although Adrian E. was 19 at the time of the alleged crimes, Jonathan P. was a minor. In order to protect Jonathan's identity, we refer to both victims by their first name and the first initial of their last name.

[2] All further statutory references are to the Penal Code unless indicated otherwise.

[3] We recount the details of defendant's sentence, below, when we address his claims of sentencing error.

Interstate 215 in Murrieta. A red Ford Mustang was also getting on the freeway ahead of Adrian and the driver prevented Adrian from passing once the two cars had successfully merged into traffic. Each time Adrian changed lanes the Mustang's driver also changed lanes, and prevented Adrian from passing.

Eventually, Adrian caught up to the Mustang and as he did so, he "flipped off" the Mustang's driver; the driver returned the gesture. As Adrian was about to exit the freeway at the Winchester Road off-ramp, the driver of the Mustang slowed down and pulled along side Adrian's car, on the driver's side. The driver pointed a handgun at Adrian and Jonathan P. and fired two shots. One bullet hit the rear passenger seat and another hit just below the driver's side mirror, punctured the steering column and bounced off Jonathan's leg.

Adrian reported the shooting to the sheriff's department. He provided a description of the car and the vehicle's license plate, which included a veteran's medal as part of the number. The investigating deputy sheriff determined defendant owned the red Mustang. Adrian and Jonathan identified defendant from a photographic lineup as the driver of the Mustang.

The sheriff's deputy arrested defendant five days later at his parents' home in Wildomar. After reading defendant his *Miranda*[4] rights, the deputy who arrested defendant asked him where he had been on September 26 about 1:45 p.m. In response, and apparently before the officer had described the incident, defendant spontaneously

[4] *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].

said something like, "I don't know why people were acting like that on the freeway" and that he did not understand why people pick on him; maybe it was because he drove a red Ford Mustang. Defendant denied being involved in any shooting and claimed that he was at home at the time the shooting occurred. When asked, defendant admitted he owned a gun but said it was in Arizona.

In his defense, defendant's mother and father testified that defendant was home with them at 1:37 p.m. on the day of the incident.[5]

DISCUSSION

We first address defendant's claims that the trial court made various errors in instructing the jury.

1.

JURY INSTRUCTIONS

Defendant contends that the trial court erred by instructing the jury according to CALJIC Nos. 2.28, 2.52, and a modified version of 2.00.

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[5] Defendant's father testified at trial that on October 9, 2003, he and his wife sat down together to make a record of the pertinent events, like where they were, at what time, and what they were doing on September 26, 2003, the date of the shooting, so they could "remember it clearly, if necessary, later on." Defendant's parents both testified that defendant had started a new job on September 24 at a nearby elementary school. Defendant's father testified that although he could not recall the exact time defendant arrived home on his first two days of work, on September 26, 2003, defendant got home at 1:37 p.m., a fact about which defendant's father was certain because he had looked at his watch. Defendant's mother testified that she too checked her watch when she heard defendant's car pull into the garage at 1:36 p.m. on September 26, 2003.

A. CALJIC No. 2.28

At the prosecutor's request, and based on defendant's apparent failure to timely identify his parents as witnesses and to provide their statements to the district attorney as required under the discovery statute (§ 1054.3), the trial court instructed the jury according to CALJIC No. 2.28 that, "The prosecution and the defense are required to disclose to each other before the trial the evidence each intends to present at trial so as to promote the ascertainment of the truth, save court time and avoid any surprise which may arise during the course of the trial. Delay in the disclosure of evidence may deny a party a sufficient opportunity to subpoena necessary witnesses or to produce evidence which may exist to rebut the non-complying party's evidence. Disclosures of evidence are required to be made at least 30 days in advance of trial. Any new evidence discovered within 30 days of trial must be disclosed immediately. In this case, the defendant failed to timely disclose the following evidence: The alibi testimony of [his parents] Dr. and Mrs. Martin and the existence of the notes they said they made on October 2nd, 2003. [¶] Although the defendant's failure to timely disclose evidence was without lawful justification, I have, under the law, permitted the production of the evidence at this trial. [¶] The weight and significance of any delayed disclosure are matters for your consideration. However, you should consider whether the untimely disclosed evidence pertains to a fact of importance, something trivial or subject matters already established by other credible evidence."

As defendant correctly notes, CALJIC No. 2.28 has been criticized, most recently in *People v. Lawson* (2005) 131 Cal.App.4th 1242 (*Lawson*), as problematic because the

instruction not only attributes blame to the defendant for the discovery violation, when though the most likely cause is the defendant's attorney, but it also suggests that the discovery violation constitutes an attempt to conceal pertinent evidence. (*Lawson*, at p. 1247.) In addition, although the instruction suggests that the jury should do something about the concealment, the instruction fails to provide guidance either on how to assess the effect of the purported concealment or on what to do about it once the effect is ascertained. (*Lawson*, at pp. 1247-1248; see also *People v. Cabral* (2004) 121 Cal.App.4th 748; *People v. Saucedo* (2004) 121 Cal.App.4th 937; *People v. Bell* (2004) 118 Cal.App.4th 249.)

For the reasons stated in *Lawson*, and in the cases cited therein, we agree that CALJIC No. 2.28 is problematic and it most likely is error to give the instruction. We will not address the issue further however because even if the trial court erred in giving CALJIC No. 2.28, that error would require reversal of defendant's conviction only if it were prejudicial. As defendant acknowledges, the test for prejudice set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836, governs error resulting from the trial court's erroneous instruction on a general principle of law applicable to the case. Under that test, reversal is required only when a review of the entire record establishes a reasonable probability that the error affected the outcome of the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 178.)

Defendant's optimistic view notwithstanding, the evidence of his guilt in this case is very strong, if not overwhelming. Both Adrian and Jonathan described defendant's Mustang and provided the vehicle's license plate number, including the detail that the

license plate contained a veteran's medal; both victims identified defendant as the shooter from a photographic lineup and both did so immediately upon spotting defendant's photo and before the law enforcement officer could complete the pertinent admonition. Both victims identified defendant in court during trial as the person who had fired shots at them. In contrast, the alibi testimony of defendant's mother and father was not credible for the same reason that the belated disclosure of alibi testimony is always suspect – if the defendant had an alibi, why did his parents wait until trial to come forward with the information.[6]

In view of the foregoing evidence, we conclude that any error in giving CALJIC No. 2.28 was harmless in that it is not reasonably probable the jury would have believed defendant's alibi and thereby reached a result more favorable to him in this case if the trial court had not given the instruction.

B. CALJIC No. 2.52

Defendant next contends, and we agree, that it was error for the trial court to instruct the jury according to CALJIC No. 2.52 that, "The [f]light of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but it is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether the defendant

[6] Defendant's father testified that he had showed the October 2 notes to the two most recent of defendant's three attorneys. However, defendant's alibi was not presented to any law enforcement officer or to the district attorney's office until trial.

is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide."

"'In general, a flight instruction "is proper where the evidence shows that the defendant departed the crime scene under circumstances suggesting that his movement was motivated by a consciousness of guilt." [Citations.] "'[F]light requires neither the physical act of running nor the reaching of a far-away haven. [Citation.] Flight manifestly does require, however, a purpose to avoid being observed or arrested.'" [Citations.] "Mere return to familiar environs from the scene of an alleged crime does not warrant an inference of consciousness of guilt [citations], but the *circumstances* of departure from the crime scene may sometimes do so." [Citation.]' [Citation.]" (*People v. Smithey* (1999) 20 Cal.4th 936, 982, quoting *People v. Bradford* (1997) 14 Cal.4th 1005, 1055.)

The circumstances in this case do not warrant a flight instruction. Defendant committed his crimes while driving his car and thus while in motion. That he continued to move and drove away from where he fired the shots does not support an inference that defendant fled the scene in order to avoid detection or arrest, but instead supports an inference that he continued to drive rather than stop at the scene.[7]

[7] In overruling defendant's objection to CALJIC No. 2.52, the trial court noted precisely that – defendant did not stop his car to find out whether everyone in the victim's car was okay. The victim's did not stop their car either and instead drove off the freeway. Given that he had just fired two shots at them, if defendant had pursued the victims' car to inquire after their well-being, it is highly unlikely the driver of the victims' car would have stopped.

For the reasons previously discussed in connection with CALJIC No. 2.28, any error in giving the flight instruction necessarily was harmless in this case given the significant evidence of defendant's guilt. Simply put, it is not reasonably probable the jury would have reached a result more favorable to defendant had the trial court not given CALJIC No. 2.52.

C. CALJIC No. 2.00

Defendant contends the trial court erred by modifying CALJIC No. 2.00, which addresses direct and circumstantial evidence, to include examples of direct and circumstantial evidence. Defendant recounts those examples in detail, and therefore we will not recount them here. Instead we note only that they involved recently baked cookies and a child with cookie crumbs on his face. Defendant's contrary view notwithstanding, this is not a circumstantial evidence case. The evidence in this case was that both of the victims saw defendant with a gun aimed at them, they heard shots fired, and observed not only that bullets had entered their car but a bullet grazed the leg of one of the passengers. The victims also described defendant's car to the investigating law enforcement agency, and provided the car's license number. They then both identified defendant from a photographic lineup. That is direct, not circumstantial, evidence.[8]

Because the evidence in this case was direct rather than circumstantial, if the trial court's examples were incorrect, any error necessarily was harmless.

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[8] Tellingly, despite his claim that this is a circumstantial evidence case, defendant does not identify any evidence, circumstantial or otherwise, to support that assertion.

2.

EXPERT TESTIMONY

Defendant contends the trial court abused its discretion by excluding the testimony of David Bigalow, a former police officer and a licensed private investigator, who would have testified about purported defects in the photographic lineup the police showed to Adrian E. and Jonathan P. In a motion in limine, defendant had challenged the victims' identification of him on the ground that the photo lineup from which those identifications had been made was unduly suggestive, and that the deputy had not admonished either witness. The trial court denied that motion (a ruling defendant does not challenge in this appeal). In ruling that the noted testimony was inadmissible, the trial court held that whether the lineup was unduly suggestive or the identifications of defendant were otherwise improper was a question of law rather than a matter of expert opinion. In the trial court's view, unless defendant demonstrated that the lineup was in some manner legally deficient, the expert would simply be testifying that he would have conducted the lineup differently. Such testimony, in the trial court's view, is irrelevant.

Defendant contends that expert testimony was admissible because it went to the weight the jury should give to the victim's identification of defendant and, therefore, the trial court erred in excluding that testimony.

We review a trial court's ruling on the admissibility of evidence for abuse of discretion. (*People v. Sanders* (1995) 11 Cal.4th 475, 508.) We are inclined to agree with the trial court that expert testimony was not appropriate, or at least was not necessary, in order to advise the jury of the purported deficiencies in the lineup that might

have affected the victims' identification of defendant. However, we will not actually resolve the issue. The erroneous admission of evidence requires reversal of a conviction only if that error was prejudicial in that it resulted in a miscarriage of justice. (Evid. Code, § 354.) In this context, a miscarriage of justice occurs when this court is able to say, absent the erroneously excluded evidence, it is reasonably probable the jury would have reached a result more favorable to defendant. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Therefore, we will resolve the dispositive issue which is that of prejudice.

We begin our prejudice analysis by noting that defense counsel fully cross-examined the deputy sheriff about the photographic lineup and in doing so brought out each of the purported defects in that identification procedure. In particular, counsel pointed out that the deputy did not admonish Jonathon, who first identified defendant from the photo lineup, not to discuss the lineup with Adrian; the deputy did not move defendant's photograph to a different position before he showed the photo lineup to Adrian; the detective who had assembled the photo lineup did not know the description the victims had provided of the suspect; defendant's photograph was the only one in the lineup of an Asian;[9] the deputy acknowledged that, although he had been trained to read the pertinent admonition before showing a photo lineup to a crime victim, he did not do that in this case. Instead the deputy put the photo lineup on the table where Jonathan was

[9] The trial court sustained the prosecutor's relevance objection to this question. We nevertheless include the fact because we assume the jurors saw the actual photo lineup and therefore were aware of the fact that defendant's was the only photograph of an Asian.

able to and did look at the photos before the deputy could tell him not to, or was able to admonish him. Jonathan immediately identified defendant. The same thing occurred later with Adrian. Finally, in assessing prejudice we note that defense counsel argued the noted defects in his closing argument.

Adrian and Jonathan not only identified defendant from a photo lineup, they also identified his car, and provided the vehicle's license number. Moreover, both victims identified defendant in court as the person who fired two shots at them on September 26, 2003. Given the noted evidence, it is not reasonably probable the jury would have believed defendant's alibi or would have had a reasonable doubt about defendant's identity as the shooter, and thus about defendant's guilt, had the trial court allowed defendant's investigator to testify regarding the defects in the photo lineup. Accordingly, even if we were to conclude the trial court erred in excluding that evidence, that error was harmless.

3.

COMMENT DURING DEFENSE CLOSING

Defendant next contends that the trial court continuously commented on the evidence during defense closing argument and in response to objections asserted by the prosecutor. As a result, defendant contends he was denied his due process right to a fair trial.

Defendant cites four instances of purported comment by the trial court to support his claim. In the first, the prosecutor objected, "Misstates the evidence," to defense counsel's representation of what defendant said to the deputy when defendant was

arrested. The trial court responded, "I believe it does, but the jurors have to make up their own mind." Defense counsel then urged the jurors to "refer to the record" and told them they could "get a copy of anything that was said in this trial." The trial court interrupted and said, "That's wrong, too. You can have a readback of the transcript." Later, and without an objection from the prosecutor, while defense counsel was recounting the circumstances around defendant's arrest at his parents' home, the trial court interposed his own objection – "That does misstate."

The next instance of purported comment occurred when defense counsel stated that Adrian E. identified defendant because he "has seen [defendant] driving at some point[,] [c]learly that is true. . . ." defense counsel said, because Adrian and defendant both lived in the same area. When the prosecutor objected that counsel's argument misstates the evidence, the trial court admonished defense counsel in front of the jury that his argument was "improper" and the trial court said, "Don't do that again. There is no evidence in the record that [Adrian] and your client ever came into contact at any time at any place." The trial court admonished defense counsel again in front of the jury when he argued that the victims had mistakenly identified defendant because his car is distinctive, and in trying to recall the real shooter's car, defendant's car just naturally came to mind.

When the prosecutor next objected that a portion of defense counsel's argument was based on facts not in evidence, the trial court stated that he did not recall any evidence on the point and sustained the objection. The court continued, however, by advising the jury that they were to rely on their own recollections of the evidence or they

were to request a readback of the testimony but they were not to consider facts about which no evidence had been presented. The court further explained that his recollection could be faulty but because he is the judge, he gets "to make the call here." The court again exhorted the jurors that if they had any question about whether a fact was supported by evidence, they should not speculate but instead should ask the court to have the reporter read back the pertinent testimony. The trial court concluded his remarks by stating, "That is the reason I sustained these objections because it is improper for attorneys to ask you, or suggest to you that you consider or discuss facts as to which there is no evidence."

At the conclusion of his closing argument, defense counsel moved for a mistrial based on the trial court's action of chastising him in front of the jury and repeatedly sustaining the prosecutor's objections because there was genuine disagreement about the state of the evidence which defendant argued the trial court should have left to the jury to resolve. The trial court denied defendant's motion, a ruling defendant does not challenge on appeal.

Defendant contends on appeal that the trial court's conduct during defense counsel's closing argument exceeded the trial court's statutory and constitutional authority to engage in fair comment on the evidence. As the Supreme Court observed in People *v. Rodriguez* (1986) 42 Cal.3d 730, "[J]udicial comment on the evidence must be accurate, temperate, nonargumentative, and scrupulously fair. The trial court may not, in the guise of privileged comment, withdraw material evidence from the jury's

consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power." (*Id.* at p. 766.)

In our view several of the trial court's statements were unnecessarily harsh, if not actually intemperate. However, the trial court did clearly admonish the jury, as set out above, that the jurors were to rely either on their own recollections or on readbacks of the testimony to decide what evidence had been presented at trial.[10] We must presume the jury followed the trial court's admonition, absent an affirmative contrary showing. (*Weeks v. Angelone* (2000) 528 U.S. 225, 234.) Consequently, the trial court's statements, even if inappropriate, did not affect the verdict and therefore were harmless beyond a reasonable doubt.[11]

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[10] At oral argument, defendant urged reversal of his conviction, citing *People v. Sturm* (2006) 37 Cal.4th 1218, and contending that the cumulative effect of the judicial misconduct in this case was prejudicial. The judge in *People v. Sturm* incorrectly stated the law to the venire during jury selection following a mistrial in the penalty phase of a death penalty case, interrupted defense counsel 30 times during presentation of the defense evidence, and, in the presence of the jury, disparaged defense counsel and defense witnesses. Because the judge's misconduct affected every aspect of the trial, from jury selection to closing argument, the Supreme Court held it was prejudicial and reversed the jury's death penalty recommendation. In contrast, the judge in this case sustained or interposed four objections during defense closing argument, all of which pertained to the state of the evidence that had been presented at trial. Unlike the judicial misconduct at issue in *People v. Sturm*, here the judge's statements, even if intemperate, were limited in time, quantity, and subject. Therefore, those comments did not affect the entire trial and were not prejudicial.

[11] Defendant contends without citation to authority that the "harmless beyond a reasonable doubt" standard pertinent to error of federal constitutional magnitude governs our prejudice analysis. (See *Chapman v. California* (1967) 386 U.S. 18, 24.) Although we are not entirely persuaded, we nevertheless apply that standard and conclude the error was harmless.

4.

PROSECUTORIAL MISCONDUCT

Defendant contends the prosecutor engaged in misconduct, first by suggesting that defendant had disposed of the gun, which was never found, because he had been "tipped off" about the investigation, and next by improperly commenting on defendant's right to remain silent.

The first instance of purported misconduct occurred during the prosecutor's redirect examination of the investigating sheriff's deputy, Deputy Jose, after he acknowledged during cross-examination that although he had questioned defendant and defendant's car had been searched, the deputy did not find a gun or bullets. In his redirect of Deputy Jose, the prosecutor asked, "Are you aware in any way if [defendant] was tipped off as to the nature of the incident – I'm sorry, withdrawn." When defendant immediately objected, the trial court responded, "[H]e just withdrew the question. You are still ahead. Go ahead."[12] Defendant contends that the prosecutor committed misconduct by asking the quoted question.

It is improper for a prosecutor " . . . 'to ask questions which clearly suggest[] the existence of facts which would have been harmful to defendant, in the absence of a good faith belief by the prosecutor that the questions would be answered in the affirmative, or with a belief on [the prosecutor's] part that the facts could be proved, and a purpose to

[12] We presume the directive was for the prosecutor to "go ahead" and continue his redirect examination of Deputy Jose.

prove them, if their existence should be denied.' [Citation.]" (*People v. Blackington* (1985) 167 Cal.App.3d 1216, 1221, quoting *People v. Lo Cigno* (1961) 193 Cal.App.2d 360, 388.)

Although the prosecutor withdrew his question, it nevertheless had the effect of suggesting to the jury that defendant had been tipped off to the investigation, a fact about which there was no evidence, and that as a result defendant had disposed of his gun. The fact that the prosecutor withdrew the question does not solve the problem. That act is ambiguous and can imply that the prosecutor either did not have a good faith belief in the fact suggested or that he did not intend to prove the fact. The prosecutor's question was improper.

Under federal law, a prosecutor's improper remarks or questions constitute misconduct if they "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' [Citation.]" (*Darden v. Wainwright* (1986) 477 U.S. 168, 181.) "'Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "'"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'" [Citation.]' [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 819.) "Misconduct that infringes upon a defendant's [federal] constitutional rights mandates reversal of the conviction unless the reviewing court determines beyond a reasonable doubt that it did not affect the jury's verdict. [Citations.] A violation of state law only is cause for reversal when it is reasonably probable that a result more favorable to the defendant

would have occurred had the district attorney refrained from the untoward [question]. [Citations.]" (*People v. Pigage* (2003) 112 Cal.App.4th 1359, 1375.)

The prosecutor's question in this case did not render defendant's trial fundamentally unfair and therefore does not require reversal under the above-quoted federal standard. Instead, reversal is required only if the prosecutor's conduct was prejudicial under the state law standard. (*People v. Pigage*, *supra*, 112 Cal.App.4th at p. 1375.)

In assessing prejudice, we note first that the fact suggested by the prosecutor's question that was potentially harmful to defendant's case was not the possibility that defendant had been tipped off, but the fact that he had disposed of the gun he used to shoot at the victims. The fact that defendant had used a gun which he had later gotten rid of or hidden, although disputed, was established by evidence other than the prosecutor's withdrawn question. Those facts were established by the victims' testimony that they saw defendant with a gun, that defendant pointed it in their direction and fired it at them twice, and as a result two bullets hit Adrian's car, one of which grazed Jonathan's left leg. The possibility that defendant had disposed of or concealed the gun was established by reasonable inference from the fact that five days had elapsed between the time of the shooting and the time the sheriff's deputy searched defendant's car. That period of time was more than sufficient to enable defendant to dispose of, or at least conceal, the gun.

Because there was evidence presented at trial, apart from the prosecutor's withdrawn question, to show defendant had a gun and to support an inference that he disposed of the weapon, the prosecutor's question was not prejudicial. In other words, it

is not reasonably probable the jury would have reached a result more favorable to the defendant if the prosecutor had not asked the challenged question. (*People v. Pigage*, *supra*, 112 Cal.App.4th at p. 1375.)

The second instance of purported misconduct occurred during closing argument when the prosecutor was attacking the defense evidence that defendant was not on the freeway at the time of the shooting because he had driven on surface streets home, and he was at home when the shooting occurred because he left work at 1:30 p.m. and the path or route he had taken that day took five minutes to travel. The route defendant claimed he traveled was demonstrated to the jury in a videotape made by defendant's investigator, Mr. Bigalow. In attacking the significance of that evidence in his closing argument, the prosecutor said, "[T]hat is a nice videotape showing you a path somebody could take to the defendant's house. [¶] Did anybody come in here and testify that they saw [defendant] take that path on the way home?" Trial counsel objected to the argument, and the trial court overruled that objection.

Defendant contends the argument is improper because it constitutes a comment on defendant's failure to testify at trial and therefore infringes on defendant's Fifth Amendment right against self-incrimination. As such, defendant contends that the prosecutor's argument runs afoul of *Griffin v. California* (1965) 380 U.S. 609, 615 (*Griffin*), which precludes direct or indirect comment on the defendant's exercise of the Fifth Amendment privilege to remain silent and not testify at trial.

Although the prosecutor came close to crossing the line, we conclude that the argument is a comment on the state of the evidence and as such does not run afoul of

Griffin, and the Fifth Amendment. A prosecutor may comment on the state of the evidence, which includes pointing out the failure of the defendant to present evidence to support a defense claim, without violating the principles set out in *Griffin*. (*People v. Morris* (1988) 46 Cal.3d 1, 35-36.) Here, the prosecutor was arguing that the videotape was irrelevant because there was no evidence to show that defendant actually took the route depicted in that video on the day of the shooting. By arguing that defendant did not call a witness who could corroborate defendant's claim by testifying that the witness actually had seen defendant driving on the route depicted in the video, the prosecutor did not imply that defendant should have testified. In fact, the logical inference from the prosecutor's argument is that corroborating testimony from someone without connections to defendant was necessary to lend credibility to defendant's claim. For these reasons we conclude that the prosecutor's argument on this point was not improper and we also must reject this aspect of defendant's misconduct claim.

5.

SENTENCING

Defendant's final claims are directed at challenging his prison sentence of nine years four months. In sentencing defendant to prison, the trial court first found that defendant was ineligible for probation under section 1203, subdivision (e)(2), which specifies that a defendant who uses a deadly weapon on a person during the commission of a crime shall not be granted probation "[e]xcept in unusual cases where the interests of justice would best be served." After denying probation to defendant, the trial court imposed the midterm of three years on count 1, defendant's conviction for assaulting

Adrian E. with a firearm, and the midterm of four years on the related gun use enhancement. On count 2, defendant's conviction for assaulting Jonathan P. with a firearm, the trial court imposed a sentence of one-third the midterm of three years, and one-third the midterm of four years on the related gun use enhancement, all to be served consecutively to the sentence imposed on count 1. The trial court also imposed a concurrent five-year prison term on count 3, defendant's conviction for discharging a firearm at an occupied motor vehicle.

Defendant first contends that this is an unusual case, in which the interests of justice would be served by granting defendant probation, and therefore the trial court abused its discretion by denying probation and sentencing defendant to state prison. Defendant simply is wrong.[13]

Defendant notes that the trial court relied on the criteria listed in rule 4.413 of the California Rules of Court for determining whether a defendant is eligible for probation. Defendant argues that the trial court either incorrectly applied or failed to consider those factors. In particular, defendant argues that he did not fire into the passenger

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[13] The probation officer recommended that the trial court grant defendant five years of formal probation, including a "moderate period of custody." In making that recommendation, the probation officer also noted that a prison sentence in this case "is certainly justified." The probation officer based his recommendation on defendant's "lack of a criminal history and his stated intentions of fully cooperating with probation." The probation report also indicates that defendant's parents had submitted a notebook that contained information regarding defendant's recent service in the Air Force, related commendations, and "letters from family, friends, employers past and present, professors, and former military commanders attesting to defendant's character, his devotion to family and his community service."

compartment of the car and therefore the fact giving rise to the probation limitation is less serious in this case than in the typical assault with a firearm. (Cal. Rules of Court, rule 4.413(c)(1)(i).) According to defendant, his crime was a typical assault with a firearm.

Under section 1203, subdivision (e)(2), the fact that defendant committed the crime of assault with a firearm is sufficient to support the trial court's denial of probation. The burden is on defendant to show that this is an unusual case and that the trial court's sentencing decision was an abuse of discretion. (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977.) Defendant has not met that burden.

His contrary arguments notwithstanding, the only circumstance that suggests this in an unusual case is that defendant, who was 37 years old at the time of the crime, did not have a criminal history and therefore the current crime appears to be an isolated incident of aberrant behavior. There is no question that defendant's conduct involves aberrant behavior. However, nothing in the record supports a conclusion that the behavior is an isolated incident that is not likely to be repeated. As the Attorney General points out, defendant did not acknowledge to the probation officer that he had committed the crime and instead insisted that he had been wrongly convicted. Consequently, there is no evidence from which the court could find that this is an isolated incident. Because defendant did not acknowledge his conduct, the record also does not support what in our view is his highly cynical assertion that he was provoked and therefore committed the crime "under circumstances of great provocation, coercion, or duress." (Cal. Rules of Court, rule 4.413(c)(2)(i).)

Moreover, defendant's factual assertion that he did not shoot into the passenger compartment is inaccurate. Although the bullets defendant fired may not have initially entered Adrian E.'s car through the passenger compartment, at least one traveled through the passenger compartment, as established by Deputy Jose's testimony that one bullet traveled through the dashboard and steering column and that that bullet was found on the front passenger floorboard. Presumably that bullet is the one that grazed Jonathan P.'s left leg.

In short and simply put, defendant has failed to demonstrate that the trial court abused its discretion by finding that this was not an unusual case in which the interests of justice would be furthered if defendant were granted probation.

Defendant next contends that the trial court abused its discretion by imposing the middle rather than the lower, or mitigated, term of imprisonment. Specifically, defendant contends that the circumstances in mitigation outweighed those in aggravation; that the trial court failed to consider certain mitigating facts; and that the court considered an element of the crime, namely the fact that defendant used a gun, as a fact in aggravation.

Under section 1170, subdivision (b), the trial court was required to impose the middle term of imprisonment unless there were circumstances in mitigation or aggravation of the crime.[14] Because it is the presumptive term, once the trial court has

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[14] Section 1170, subdivision (b) states, in pertinent part that, "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime."

stated reasons for denying probation, the court may impose the middle term of imprisonment without stating any additional reasons. (*People v. Lobaugh* (1987) 188 Cal.App.3d 780, 785-786.) If, as defendant contends, the trial court cited the fact that defendant used a firearm as a reason to impose the middle term, the statement is irrelevant since the trial court was not required to state any reasons at all for that sentencing choice. The only time the trial court is precluded from using a fact that is an element of a crime is when the court imposes the upper term. (Cal. Rules of Court, rule 4.420(d).)

Defendant also has not demonstrated that the trial court abused its discretion by imposing the middle rather than the lower term. In addressing this claim, we again note as the trial court did, that defendant denied to the probation officer that he committed the crimes of which the jury found him guilty. Because he has denied his involvement in the crimes, there are no facts in mitigation other than the fact that defendant has no criminal history.[15] Moreover, the purported mitigating factors defendant cites are extremely cynical – he did not intend to harm anyone because he did not fire into the passenger compartment of the car; he was provoked into shooting by the victims who either cut him

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[15] Defendant asserts that requiring him to acknowledge guilt or show remorse is tantamount to requiring him to take the stand and testify at trial. Defendant's characterization is clearly inaccurate. If he wants to argue facts in mitigation, and be taken seriously, he must acknowledge wrongdoing once he has been convicted. If he insists on his innocence, despite overwhelming contrary evidence and based on a theory that the victims were probably making the story up to hide their own criminal conduct, then he runs the risk that he will be sentenced more severely than if he had taken responsibility for his conduct.

off in traffic or flipped him off; and because he acted under great provocation, defendant is not likely to repeat the conduct.

We will not address defendant's claim further. His assertions are obviously meritless. Accordingly, we conclude the trial court did not abuse its discretion in this case by denying probation to defendant and imposing the middle term of imprisonment.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ McKinster
Acting P.J.

We concur:

/s/ Gaut
J.

/s/ King
J.